1979

John P. Condas et al v. George J. Condas et al : Reply Brief of Defendants-Appellants

Utah Supreme Court

Claron C. Spencer; Attorney for Plaintiffs and Respondents;
Joseph Novak; Attorney for Defendants and Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. CONDAS, GEORGE P. CONDAS, HARRY P. CONDAS, MARGARITA CREGLOW ELLIS and TESSIE MADSEN,	)	
Plaintiffs and Respondents,	)	
vs.	)	CASE NO. 15,669
GEORGE J. CONDAS, MARY CONDAS LEHMER, CHRIS J. CONDAS, NICK J. CONDAS, ELLEN CONDAS BAYAS, ALEXANDRA CONDAS OCKEY and J. CONDAS CORPORATION, a Utah corporation,	)	
Defendants and Appellants.	)	

REPLY BRIEF OF DEFENDANTS-APPELLANTS

AN APPEAL FROM THE DECREE OF THE FOURTH DISTRICT COURT IN AND FOR SUMMIT COUNTY, HONORABLE GEORGE E. BALLIF, JUDGE

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

The Brief of Respondents fails to squarely address the issues of admissibility in evidence of abstracted portions of selected testimony from the Abstract of Record in the Sullivan v. Condas case (Salt Lake County Civil No. 42140 - Supreme Court Case No. 4922). Likewise the Brief of Respondents erroneously assumes that the pleadings and Brief of John G. Condas in the Sullivan v. Condas case are declarations against interest and/or judicial admissions and are binding on appellants in this case. Furthermore, the Brief of Respondents wholly fails to address its burden of proof by clear and convincing evidence that a public roadway was established over appellants' lands.

The import of respondents' approach is to brush over the inescapable conclusion that the competent evidence in this case simply will not support the Findings of Fact, Conclusions of Law and Decree of the court below. Accordingly the Brief of Respondents cannot go unchallenged. In this Reply Brief appellants will endeavor to address the more serious deficiencies and will strive to avoid "nit-picking".

REPLY TO POINT I

The real problem with the testimony of the witnesses who testified in the Sullivan v. Condas case is the form in which it was offered in this case, ie. abstracted portions of selected testimony from the Abstract of Record. Respondent glosses over these fatal deficiencies by relying on loss of the transcript and suggesting that the circumstances under which it was prepared argue forcibly for its accuracy. Here respondents' proof consisted of selected abstracted portions of the testimony. Yet the substance of the whole testimony on the particular point or issue involved in the previous trial including both testimony given on direct examination and testimony given on cross-examination must be proved, even though the identical words need not be reproduced. Annotation: 11 A.L.R. 2d 30, §32, p. 112; 29 Am.Jur. 2d Evidence, §762 p. 832. The reason for the rule is obvious since how else could the trier of the fact or the court on appeal weigh and give fair consideration to the testimony without knowing the whole of the substance thereof given both on direct examination and cross-examination?

For the reasons stated above and those in appellants' primary brief which remain unanswered in respondents' brief, it is respectfully submitted that it was error for the trial court to receive into evidence the abstracted portions of selected testimony and to base its findings thereon was reversible error.

REPLY TO POINT II

Respondents wholly ignore the difference between a "declaration against interest" and an "admission" and loosely use the terms interchangeably. Likewise, respondents do not distinguish between "admissions by parties" or "authorized and adoptive admissions" or "vicarious admissions" and again use the terms interchangeably. Yet the rules applicable thereto are different.

Suffice it to say the only statements of John G. Condas in the Sullivan v. Condas case which might be admissible in this case are his declarations of fact against his interest given in his testimony therein under the exception contained in Rule 63(10), U.R.E. A careful reading of the abstracted portion of his testimony reveals no statement or declaration by him of a public roadway up White Pine Canyon through his property.

The pleadings and brief of John G. Condas in the Sullivan v. Condas case, even though authorized by him, are excluded from Rule 63(9), U.R.E. under the authority cited in appellants' primary brief and clearly do not fall within

the exceptions contained in Rules 63(7) and 63(8), U.R.E. Again, it was error for the trial court to receive the same in evidence and it was reversible error for the trial court to base its findings thereon.

REPLY TO POINT III

Respondents' whole argument under this point is founded on the erroneous assumption that the decision of the Intermediate Court of Appeals of Arizona in Mecham v. City of Glendale, 489 P.2d 65, 15 Ariz. App. 402 (1971), is the law in Utah. There Mecham prevailed in the prior litigation against his contract seller Owens in breach of contract by relying on the validity of the city's abandonment of the roadway. In the subsequent litigation against the city, Mecham was estopped from asserting invalidity of the abandonment which had been decided in his favor in the prior litigation.

In Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971), which is the law in Utah, this court held that collateral estoppel applies where issues which are actually decided against a party in a prior action may be relied upon by an opponent in a later case as having been judicially established. Furthermore, this court there emphasized that the issue had to be decided against the party in the prior litigation and in so doing rejects the rationale of Mecham v. City of Glendale, supra, as being the law in Utah. Here the court below adopted the rationale of Mecham v. City of

Glendale, supra, as the basis for its application of collateral estoppel to the facts of this case and in so doing committed reversible error.

In Knight v. Flat Top Mining Company, 6 Utah 2d 51, 305 P.2d 503 (1957) cited on page 18 of respondents' brief, the issue of the validity of certain mining claims was conclusively established by a judgment in a prior action between locater's of certain conflicting mining claims and this Court held that the Beehive claimants having had an opportunity to defend their title to their claims in the prior case and having failed to do so were precluded from litigating the same issues in the instant case insofar as the rights of the same parties or their successors were concerned. Here the respondents were not parties to Sullivan v. Condas and Knight v. Flat Top Mining Company, supra, simply does not apply.

In view of the foregoing, the trial court erred in its application of the Doctrine of Collateral Estoppel to the facts of this case as the whole basis for its decision and in so doing committed reversible error.

REPLY TO POINT IV

Respondents predicate their whole argument under this point on the erroneous premise that the Sullivan v. Condas case established a public roadway across appellants' lands while it was still a part of the public domain. The Findings

and Decree in that case specifically and unequivocally limited the public road from the highway along Trottman's Lane and across the lands of Sullivan with the center line specifically described to the gate on his South boundary.

Thus the language quoted from the opinion of this Court in Sullivan v. Condas, 76 Utah 585, 290 Pac. 954 (1930), on page 20 of respondents' brief is clearly obiter dictum since the appeal there was taken from the Decree which only established a public road across the then Sullivan lands. This is made more clear by the language of this Court which followed the above on the same page (290 Pac. 957), to-wit:

> We on the record are satisfied that the great preponderance of the evidence supports the findings that for fifty years prior to the commencement of the action, the public generally, the defendant and his predecessors in interest, used and occupied the roadway to the extent of one and one-half rods on each side of the center thereof as it passed through the lands of the plaintiffs and their predecessors in interest, openly, continuously, uninteruptedly and under claim of right, until wrongfully interfered with by the plaintiffs shortly before the commencement of the action, and used, treated, and regarded the roadway as a public highway. The roadway to such extent was thus decreed to be a public highway. (underscoring ours)

On page 21 of respondents' brief the comment is made that counsel for appellants never asked the trial court at any time to consider anything from the Sullivan case which was not already before it. The facts are that appellants repeatedly objected and moved to strike such evidence which was received by the trial court subject to appellants' Motion

to Strike. Some three and one-half months after final arguments the trial court denied the Motions to Strike and simultaneously decided the case on its merits in the same document (R. 181, 182). It should be obvious that it would have been to no avail to them proffer rebuttal portions of the Abstract of Record since the lower court had already made up its mind and decided the case against appellants.

Respondents then argue on page 11 of their Brief that respondents offered additional evidence on the public road from other persons still living. The fact of the matter is that respondents' witnesses James Archibald, Douglas Archibald, Earl Johnson and Gilbert Kimball all testified that there was no roadway up White Pine Canyon beyond the Del Redden cabin and that above there only a very poor trail existed. Furthermore, the witness James Archibald testified that the logging crews brought logs out on a bobsled during the wintertime when it was all covered with snow (Supplemental Record - James Archibald Deposition, pp. 5, 6) and not as stated on page 11 of respondents' brief.

The cold hard facts are that the record establishes an unbroken chain of overwhelming evidence that from 1903 to 1950 only a trail existed up White Pine Canyon beyond the first stream crossing above the John Condas buildings. Such facts are conclusively established by respondents' own live witnesses from 1903 until 1941 and by appellants' documentary evidence. Additionally, such facts are conclusively established

by appellants' witnesses and documentary evidence from 1922 until the present time. And we note that respondents had the burden of proving otherwise in the court below by clear and convincing evidence which they wholly failed to do. Accordingly, the Findings, Conclusions and Decree of the trial court must be set aside and reversed.

REPLY TO POINT V

Respondents predicate their whole argument under this point on the erroneous premise that a public road had been established across appellants' lands while the same were a part of the public domain. Sullivan v. Condas, supra, did not so decide nor does the competent evidence in this case so establish. And since no public road has been so established, the decision of the trial court relative to the action of the Summit County Commissioners is moot.

While appellants have no quarrel with the principles of law announced in Sullivan v. Condas, supra, as relating to the Sullivan lands, those principles have no application to appellants' lands herein. That is the legal reason which has been repeatedly offered by appellants in this case and which is repeatedly ignored by respondents.

REPLY TO POINT VI

Respondents complain on page 25 of their Brief that the former testimony of deceased witnesses have been ignored. Appellants make it abundantly clear on page 6 of their brief that the Statement of Facts contained therein is developed

to the exclusion of such evidence since it was inadmissible in the first place. Respondents then go on to quote selected abstracted testimony of Del Redden in an attempt to prove a point and in so doing point up the very error which results therefrom. Thus the abstracted testimony of Delbert H. Redden on page 100 thereof next preceding respondents' quote states

> "Well, in all my time there I never knew of a wagon going up half a mile above my house, not the kind, not a wagon, you understand, a four-wheeled wagon, I know of course * * * "

Appellants point up the above not because it is admissible or should be considered but to demonstrate the evil and mischief of receiving that kind of evidence. The trial court committed that kind of error and now respondents seek to compound that error on this appeal.

The documents which appellants offered into evidence speak for themselves and it serves no useful purpose to speculate on the width of the trail shown thereon or who or what must have been using them. To say as respondents do on page 26 of their brief that the homestead documents were not intended to mean that no road existed in the canyon is the rankest kind of speculation. And to suggest that the homestead papers of Pete and Gus Condas were prepared by John Condas and therefore should be interpreted differently is literally grasping at straws.

The core issue in this case was whether a public road had been established across the lands of appellants, whether

while such lands were a part of the public domain or after such lands became privately owned. Respondents had the burden of proving that issue by clear and convincing evidence. Respondents apparently concede that they did not meet their burden of proof after appellants' lands passed into private ownership. They labeled the post-turn of the century evidence as irrelevant and rest their case on Sullivan v. Condas, supra, as establishing a public road while appellants' lands were a part of the public domain. In so doing respondents' case must fail. It is just that simple.

Respondents allude to the testimony of the witness David Street which is of 1950 vintage and is absolutely of no help. Suffice it to say the testimony of his superior Don H. Peterson places it in proper perspective (R. 879-885, incl.).

While gates and signs do not destroy a public road already lawfully established, gates and signs do prevent a public road from thereafter being lawfully established since such acts negative the requisite intention of the landowner to abandon the roadway to the public use.

Demonstrative of the irreconcilable conflicts which permeate the Findings of the trial court that "the public continued to use the roadway until it was closed by defendants in 1971" (Fdg. 4) is its specific finding that John F. Condas constructed "a wooden gate of only sufficient width to permit passage of a person riding horseback across the

roadway near the southerly end of his pasture area" (Fdg. 9).

The sum and substance of it all is that based solely on inadmissible and incompetent evidence derived from the Abstract of Record of the Sullivan v. Condas case and a misconception of the Findings and Decree in that case, the lower court found that a public road had been established across appellants' property which pre-dated the acquisition thereof by their father. In so doing it completely changed the status quo of the previous 54 years and opened up the lands of appellants to the general public which has to be an incredible and unjust result. We respectfully submit that this court must remedy that unjust result by granting the relief sought by appellants in this appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the ___ day of February, 1979, I mailed two (2) copies of the foregoing Reply Brief of Defendants-Appellants to Claron C. Spencer, Attorney for Plaintiffs-Respondents, 1200 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111.

Attorney